80-761

No.____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 137; LOCAL UNION NO. 150; LOCAL UNION NO. 278; LOCAL UNION NO. 296; LOCAL UNION NO. 315; LOCAL UNION NO. 386; LOCAL UNION NO. 431; LOCAL UNION NO. 439; LOCAL UNION NO. 490; LOCAL UNION NO. 533; LOCAL UNION NO. 588; LOCAL UNION NO. 624; LOCAL UNION NO. 980, all affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

v.

FRITO-LAY, INC.,

Respondent and Cross-Petitioner.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED[1]

Whether the court of appeals erred by overturning as clearly erroneous the district court's factual finding that the damages sustained by Frito-Lay during the entire strike period were the direct result of the Union's violation of Section 8 (b)(4)(A) of the Labor Management Relations Act.

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[1]Respondent and Cross-Petitioner, Frito-Lay, Inc., is a wholly-owned subsidiary of PepsiCo, Inc.

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CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cross-Petitioner, Frito-Lay, Inc., petitions the Court for a Writ of Certiorari to review part of the judgment of the United States Court of Appeals for the Ninth Circuit, in the event that the Court grants the Petition for Writ of Certiorari in No. 80-514.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 623 F.2d 1354 (1980) and is reprinted in Appendix A to the Petition in No. 80-514. The Findings of Fact and Conclusions of Law of the district court relating to the liability trial (R. 380-388) are reprinted in Appendix C to the Petition, and the Findings of Fact and Conclusions of Law of the district court relating to the damage trial (R. 548-549) are reprinted in Appendix D to the Petition.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on July 3, 1980. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

This Cross-Petition for Writ of Certiorari is filed under Rule 19.5 of the Rules of the Supreme Court. Cross-Petitioner received the Petition for Writ of Certiorari in No. 80-514 on October 4, 1980.

STATUTORY PROVISIONS

The following provisions of the Labor Management Relations Act, 29 U.S.C. §151, *et seq.*, (hereinafter the "Act"), are relevant to this case:

Section 8 . . .

(b) It shall be an unfair labor practice for a labor organization or its agents—

. . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

Section 303. (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

STATEMENT OF THE CASE

This is a civil action brought by the Plaintiff, Frito-Lay, Inc., to recover damages sustained by it from a strike engaged in by defendants in Central and Northern California between May 12 and June 29, 1974. Defendants are fifteen local unions affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of

America (hereinafter, the "Union"). Frito-Lay alleged that the strike had an illegal object of forcing or requiring Frito-Lay to join an employer organization in violation of Section 8(b)(4)(A) of the Labor Management Relations Act, 29 U.S.C. §151, *et seq.* (hereinafter, the "Act"). Subject matter jurisdiction was based upon Section 303 of the Act, which provides that whoever shall be injured in his business by an unfair labor practice as defined in Section 8(b)(4) of the Act may bring suit in federal district court to recover damages and the cost of suit.

The case was tried on a bifurcated basis before the United States District Court for the Northern District of California, the Honorable Charles B. Renfrew presiding. With respect to liability, the court found that "*the* object of defendants' strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization" (emphasis added, Findings, ¶ 29, R. 387), concluded that defendants had engaged in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act (Conclusions, ¶ 4, R. 387), and ordered that Frito-Lay should recover its damages in the amount to be proven at the subsequent trial on damages. (Order, R. 388) The trial court subsequently found that Frito-Lay sustained lost profits of $554,154 and extra-ordinary expenses of $134,364, both as "the direct result of defendants' illegal strike." (Findings, ¶ ¶ 1-2, R. 548-549) Judgment was entered in favor of Frito-Lay in the amount of $688,518. (R. 550-551)

On appeal to the United States Court of Appeals for the Ninth Circuit, the Union contended that section 8(b)(4)(A) proscribes a strike to force an employer to become a member of an employer organization, but that it does not proscribe a strike to force competing employers to bargain on a group basis. The Union also argued that the trial court's findings of fact nos. 21-22, 24-25, and 29 relating to the question of

liability and the trial court's findings of fact nos. 1-2 relating to the award of damages were all clearly erroneous.

The court of appeals affirmed the district court's judgment of liability, but limited it to the period of the strike from May 12 to June 7, 1974, rather than from May 12 to June 29 as found by the trial court. Such limitation would substantially reduce, by over 40 percent, the amount of the judgment entered by the district court.

The Union has petitioned this Court for a Writ of Certiorari to review the ultimate factual finding, affirmed on appeal, that the object of the Union's strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization. As set forth in Respondent's Brief in Opposition, Frito-Lay submits that such an issue is not appropriate for review on certiorari, because it only concerns the quantum of evidence in the record supporting the trial court's finding. Moreover, substantial evidence clearly supports the challenged finding, as concluded by the court of appeals.

In the event, however, that the Court grants the Union's Petition, Frito-Lay requests that the Court grant this Cross-Petition to review the court of appeals' reversal of the trial court's finding that Frito-Lay was entitled to recover damages sustained during the entire period of the strike, from May 12 to June 29, 1974.

SUMMARY OF ARGUMENT

Substantial evidence in the record supports the district court's factual finding that the damages sustained by Frito-Lay during the entire period of the strike were the direct result of the Union's illegal objective. The court of appeals erred in substituting its factual determination for that of the trial judge who heard the testimony and was intimately familiar with the record of the case.

Alternatively, even if the court of appeals is correct in concluding that the Union's illegal objective ceased on June 7, the court should have remanded to the district court for consideration of the issue of whether the effect of the Union's unlawful conduct continued beyond June 7.

REASONS FOR GRANTING THE PETITION

The court of appeals erred as a matter of law in overturning as clearly erroneous the factual finding of the district court that damages sustained by Frito-Lay during the entire strike period were "the direct result of defendants' illegal strike." (Findings, ¶ ¶ 1-2, R. 548-549)

The district court found that the Union's strike, which remained in effect against Frito-Lay from May 12, 1974 to June 29, 1974, (Findings, ¶ ¶ 26-27, R. 386), had the illegal object of forcing or requiring Frito-Lay to bargain and act as if it belonged to an employer organization. (Findings, ¶ 29, R. 387) The court made no finding of fact either that the Union renounced such illegal object prior to June 29 or that the Union ever ceased forcing Frito-Lay to bargain and act as if it were a member of an employer organization.

At the trial on damages, Frito-Lay sought to recover lost profits and extraordinary expenses sustained during the entire period of the strike (May 12 - June 29, 1974). The Union argued, *inter alia,* that Frito-Lay's damages should be limited to recovery of losses occurring prior to June 7, 1974, when Frito-Lay's employees, voting separately, rejected Frito-Lay's latest offer. The district court, based upon the evidence in the record, rejected the Union's position and awarded damages to Frito-Lay sustained during the entire period of the strike.

The court of appeals reversed the finding of the district court, concluding that the improper purpose of the strike was abandoned on June 7, 1974 and that the Union's liability ceased after that day. *Frito-Lay, Inc. v. Local Union No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 623 F.2d 1354, 1362 (9th Cir. 1980). In so doing, the court noted that the Union had accepted a separate contract with Goose on June 6, 1974. On June 7, Frito-Lay's employees, voting separately, voted against a proposed Frito-Lay contract. After comparing the proposal with the Granny Goose contract, the Union Negotiating Committee had recommended that the Frito-Lay offer be turned down and that the Union match the Goose proposal or at least ask. The court of appeals states that that recommendation was not unlawful and that it did not evidence a continuing demand that Frito-Lay join in multi-employer bargaining. In sum, the court below concluded as follows:

> The events of June 6 and 7 show an abandonment of the unlawful objective and a retreat to the lawful objective of obtaining, in a separate contract, terms as close to those of the Granny Goose contract as bargaining and the strike could compel Frito-Lay to accept. The abandonment should have been apparent to the employer when it occurred, and it cannot be said that either side was any longer affected by the illegal object previously pursued by the Union. We hold that the unlawful purpose of the strike was effectively abandoned on June 7, 1974, and that after June 7 the strike was lawful. The union is not liable for damages caused by the strike after June 7.

Frito-Lay, Inc., supra, 623 F.2d at 1363.

In overturning as clearly erroneous the district court's finding, the court of appeals ignored the repeated admonitions of this Court regarding the limited function of an

appellate court in applying Rule 52(a) of the Federal Rules of Civil Procedure. As stated in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100, 123 (1969):

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 395 . . . (1948).

Because substantial evidence in the record supports the trial court's finding that Frito-Lay was entitled to damages sustained after June 7, 1974, the court below could not have the definite and firm conviction that a mistake has been committed. Its reversal, therefore, is not in accord with the standard of review established by this Court in *Hazeltine, supra.* A brief review of the evidence demonstrates the correctness of the district court's finding.

Even after the Union membership ratified a contract with Goose on June 6, the Union still demanded that Frito-Lay and Scudder's sign identical contracts. In fact, the Union had a commitment with Goose not to settle for less with any other company. (Liability Tr. 56-57, 316-317; Clegg depo. 249, 251-253) Moreover, the intent of the Union's negotiating committee remained to have Frito-Lay and Scudder's sign the identical contract that Goose signed. (Webb[2] depo. 69)

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[2]Mr. Webb was a member of the Union's negotiating committee.

On June 7, 1974, Frito-Lay's employees were for the first time allowed to vote separately on their company's proposal. But at that meeting, the negotiating committee gave the membership a comparison of Frito-lay's proposal and the Goose contract and on that basis recommended rejection of Frito-Lay's offer. (Salido depo. 61-62, 66; Torris depo. 112)

On June 11, the chairman of the Union's negotiating committee told Frito-Lay "that there was not going to be any settlement" unless Frito-Lay dropped the lawsuit and its unfair labor practice charges at the National Labor Relations Board. (Liability Tr. 60) He then demanded that Frito-Lay get its offer up with the Goose settlement (*Id.* 61) and indicated areas of the Goose contract that Frito-Lay would have to accept. (*Id.* 61-63)

Although the other two companies had both settled with the Union by June 18, Frito-lay's employees did not have an opportunity to vote on a Frito-Lay proposal until June 29. Thus, the effect of the illegal object continued beyond the time that Goose and Scudder's had settled. Moreover, as late as June 28, the Union insisted that Frito-Lay accept inapplicable contract provisions, in order to have uniformity with the other contracts. (Liability Tr. 124)

Based upon evidence such as that summarized above, Frito-Lay argued to the trial court that the Union never withdrew its unlawful demand and never ceased forcing Frito-Lay to bargain and act as if it were a member of an employer organization. Alternatively, Frito-Lay argued to the trial court that even if the Union's illegal objective ceased on June 7, the effects of the Union's prior unlawful conduct continued unabated because the Union recommended the rejection of Frito-lay's offer on June 7 and because Frito-Lay's employees did not have another opportunity to vote until June 29, when the strike ended. (R. 508)

Irrespective of the above evidence and the above arguments, the court of appeals rather cavalierly reversed the district court's finding, concluding that the Union's illegal objective ceased on June 7. The court of appeals had no basis for substituting its determination of the facts for that of the district court, which heard eight days of trial testimony and which reviewed a vast record of exhibits and deposition testimony in reaching its factual findings. In any event, even if the court below were correct in concluding that the illegal object ceased on June 7, it should have remanded for further consideration of related issues, rather than entering a reversal.

The court below notes the well-settled principle that the effects of an illegal strike may last beyond the time when the Union "renounces the illegal object and confines its demands to lawful purposes." But the court below enters a reversal in this case because "there was no explicit finding that the illegal object pursued by the Union was a substantial cause of the strike's continuance after that object was abandoned." *Frito-Lay, Inc., supra,* 623 F.2d at 1363. The fact is that the district court made no finding that the Union "renounced the illegal object" prior to June 29. Thus, there was no reason for the district court to consider the question of whether the effects of the illegal object continued beyond its cessation. The failure to make such an explicit finding, then, cannot be the basis for reversal. At the most, the court of appeals should only have remanded to the district court for consideration of that issue, just as it did with respect to other damage issues, in light of the court of appeals' conclusion that the illegal object ceased on June 7.

Finally, if this Court grants the Union's Petition, it will undertake to review the issue of whether substantial evidence in the record supports the district court's factual

finding that the illegal object of the strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization. In making such a review of the record, the Court would necessarily review the evidence supporting the district court's finding that the illegal object continued in effect for the duration of the strike against Frito-Lay. Because the questions presented by the Petition and the Cross-Petition are so closely related, the Court should grant the Cross-Petition in the event that it grants the Petition.

CONCLUSION

For the above reasons, Frito-Lay respectfully submits that the Cross-Petition for Writ of Certiorari should be granted.

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